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| STATE OF SOUTH CAROLINA                  | ) | BEFORE THE SOUTH CAROLINA |
|  | ) | PROCUREMENT REVIEW PANEL  |
| COUNTY OF RICHLAND                       | ) |                           |
|  | ) |                           |
|  | ) | ORDER                     |
| IN RE:                                   | ) |                           |
|  | ) | Case No. 2008-5           |
| Protest of South Carolina Association of | ) |                           |
| the Deaf; Appeal of South Carolina       | ) |                           |
| Association of the Deaf                  | ) |                           |
|  | ) |                           |
| Solicitation No. 5400000137              | ) |                           |
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This matter came before the South Carolina Procurement Review Panel (the Panel) for a hearing on December 9, 2008. The Panel heard an appeal of the September 12, 2008, decision of the Chief Procurement Officer (the CPO) for the Information Technology Management Office (ITMO) by the South Carolina Association of the Deaf (SCAD). The CPO's decision dismissed SCAD's protest for lack of standing and jurisdiction and upheld ITMO's Intent to Award, on behalf of the Office of Regulatory Staff (ORS), a contract to Country World Productions, Inc., d/b/a U.S. Captioning Company (U.S. Captioning) for the provision of real-time closed captioning services for daily news broadcasts. SCAD appealed the CPO's dismissal of its protest on jurisdictional grounds.

In the hearing before the Panel, John E. Schmidt, III, Esquire, represented SCAD. Marcus A. Manos, Esquire, and Manton Grier, Jr., Esquire, represented U.S. Captioning. Craig K. Davis, Esquire, and Florence P. Belser, Esquire, represented ORS. Keith C. McCook, Esquire, represented the CPO.

### **Findings of Fact**

On January 4, 2008, ITMO issued an IFB on behalf of ORS to procure real-time closed captioning services for daily news broadcasts in the state's four major media markets (Trident, Midlands, Upstate, and the Pee Dee). The IFB set a bid opening date of January 31, 2008. After

several amendments and an unrelated appeal to the Panel<sup>1</sup>, the bid opening date was eventually set for July 8, 2008 at 2:30 p.m.

On July 8, 2008, SCAD encountered problems uploading its bid into the State's online bidding system. As a result, SCAD's written response to the IFB was delivered to the CIO office and time stamped at 4:00 p.m. on July 8; SCAD's online submission was received at 4:46 p.m. ITMO did not accept SCAD's bid because it was not received by the 2:30 p.m. deadline. Although a copy of the Intent to Award is not in the record before the Panel, U.S. Captioning was the successful bidder. The award has been stayed since August 21, 2008, pending SCAD's protest.

In its original protest, SCAD asserted that U.S. Captioning had submitted false information in its bid and was therefore not responsible. In support of its protest, SCAD provided affidavits from representatives of two of the television stations U.S. Captioning claimed to be ready to do business with if awarded the contract. These affidavits indicate that, contrary to U.S. Captioning's representations in its bid, WYFF and WIS would not allow U.S. Captioning to provide closed captioning services.

### **Conclusions of Law**

U.S. Captioning moves to dismiss SCAD's protest and appeal because SCAD did not submit a timely bid and, therefore, does not have standing to protest. The CPO also moves to dismiss based on these same grounds. The relevant provision of the Consolidated Procurement Code provides that "[a]ny actual bidder . . . who is aggrieved in connection with the intended award . . . shall protest to the appropriate chief procurement officer . . . within ten days of the date award or notification of intent to award, whichever is earlier, is posted in accordance with this code." S.C. Code Ann. § 11-35-4210(1)(b) (Supp. 2007). Thus, in order to protest an award

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<sup>1</sup> See *In re: Protest of South Carolina Association of the Deaf*, Panel Case 2008-2 (June 17, 2008) (dismissing SCAD's protest of the solicitation itself based on untimeliness).

or intended award, a party must bid on a contract and the State must announce its intent to award the contract to another bidder. *In re: Protest of American Southern Insurance Co.*, Panel Case Nos. 2003-3(II) and 2003-6 (October 24, 2003). The Panel has previously held that a party who does not submit a bid lacks standing. *In re: Protest of Laurens County Service Council for Senior Citizens*, Panel Case No. 1990-18; *In re: Protest of Winyah Dispensary, Inc.*, Panel Case No. 1994-18 (January 20, 1995). Likewise, the Panel has also ruled that a party who submits a “no bid” does not have standing to protest. *In re: Protest of Smith & Jones Distrib. Co.*, Panel Case No. 1994-5.

In the instant case, SCAD admits that its bid was late. Moreover, because it was late, the State rejected SCAD’s bid. *See* S.C. Code Ann. Regs. 19-445.2070(G) (Supp. 2007) (requiring rejection of any bid received after the time for bid opening has been declared). Based on these facts, the Panel finds that SCAD has the same status as a party who has not submitted a bid and, therefore, has no standing to protest the intended award.<sup>2</sup> Indeed, SCAD, having submitted a late bid, is no different from any private citizen, who may have an interest in how the State awards contracts, but does not have standing under the Consolidated Procurement Code to protest such awards. Furthermore, the Panel cannot confer standing based on allegations of misrepresentation or inability to perform.

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<sup>2</sup> SCAD urged the Panel to consider its protest regardless of standing because it raised the issue of responsibility based on information not known at the time of opening. SCAD and ORS argued that the CPO had a duty to make a determination regarding U.S. Captioning’s responsibility under S.C. Code Ann. section 11-35-1810(1) and S.C. Code Ann. regulation 19.445-2125(D) once the information contained in the affidavits was brought to his attention. While the Panel is sympathetic to ORS’s plight, the Panel concludes that the Consolidated Procurement Code does not provide a mechanism for doing what ORS and SCAD requests it to do outside the protest framework. Because SCAD does not have standing to protest, the Panel does not have jurisdiction at this point to reexamine the issue of responsibility.

For the reasons stated above, the Panel dismisses SCAD's protest.<sup>3</sup>

**IT IS SO ORDERED.**

**SOUTH CAROLINA PROCUREMENT REVIEW PANEL**

**BY:** /s/ J. Phillip Hodges, Jr.

**J. Phillip Hodges, Jr., Chairman**

This 18<sup>th</sup> day of December, 2008

Columbia, South Carolina

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<sup>3</sup> The Panel notes that only the State can determine whether or not an awardee is able to perform once the contract has been awarded. If an awardee is ultimately unable to perform, then the State may pursue the remedies available to it under the contract.